A.J. LAKSHMINARAYANAN

v.

G. MARIMUTHU

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 443 OF 1984]
14 FEBRUARY 1993

PRACTICE & PROCEDURE: Contempt of Court - Application for warrant of committal to be executed - Application made on the grounds that defendant had failed to pay the fine stated in the committal order within the specified time - Whether warrant should be executed - Consideration of O. 53 r. 6 Rules of the High Court 1980.

The defendant was found guilty of contempt of Court for being in breach of and for disobeying an order of the Court for which she was fined a sum of RM 2,000 to be paid within one month from the date of the order in default of which she was to be imprisoned for two weeks. The defendant failed to pay the fine within the specified time and the plaintiff sought to execute the warrant of committal on the defendant's failure. It was not disputed that the fine was in fact paid, *albeit* late.

Held:

[1] The terms of the order were not settled before the expiry of the one month period given to the defendant to settle the fine and she had not been served with the notice required to be served on her under O. 53 r. 6(2).

[2] In any event the fine had in fact been paid and it would not be justifiable to allow the warrant of committal to be executed against the defendant merely to rigidly enforce a stipulation in an order as to a date by which a fine has to be paid when the date has come and gone but otherwise the contempt has been purged.

[Plaintiff's application for warrant to be executed dismissed].

Cases referred to:

Corcoran v. Corcoran [1950] 1 All ER 495 ***(refd)***
Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***
Phonographic Performance, Ltd. v. Amusement Caterers (Peckman), Ltd. [1963] 3 All ER 493 ***(refd)***
Re W. (B) (an infant) [1969] 1 All ER 594 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 53 r. 6(1), (2)

For the plaintiff - S.P. Annamalai; M/s. Annamalai & Co.
For the defendant - Francis V. Nathar; M/s. Francis Nathar & Co.

JUDGMENT

K.C. Vohrah:

At the restored hearing of the notice of motion in respect of contempt proceedings against the defendant the plaintiff applied for the warrant of committal issued against the defendant to be executed on the ground that though the defendant had surrendered the key to her premises to the plaintiff and had paid the fine in compliance with the committal order made by Lim Beng Choon J. she had failed to pay the fine within the time specified by him in the order.

Contempt proceedings were taken by A.R. Jayaram against the defendant in 1988 for breach of a Court order made in 1985.

The proceedings were taken for an order that the defendant "be committed to prison for her contempt of this Court in breach and disobedience of the order of Court dated 3 July 1985, to wit in failing and/or neglecting to deliver up possession of the premises known as No. 3, Lorong Ganding (previously known as No. 3, Kampung Shanmugam), Jalan Langgar, Alor Setar within 2 weeks from the date of the order and therefore disallowing the plaintiff to be reinstated as the lawful tenant of the said premises and in disturbing and interfering with the plaintiff's quiet and peaceful occupation of the said premises.

On 2 April 1988 Lim J. at the hearing of the notice of motion (Enclosure 40) found the defendant guilty of contempt of Court and ordered her to be fined a sum of RM2,000 for her contempt "until she purges her contempt" and further ordered that the fine be paid within 1 month from the date the order was made and in default thereof the defendant was to be imprisoned for 2 weeks.

The relevant portion of the order reads as follow -

> And it appearing to the satisfaction of the Court that the defendant, G. Marimuthu

d/o Govindasamy has been guilty of contempt of Court in disobeying the order of Court dated 3 July 1985.

It is ordered that for her said contempt the defendant, G. Marimuthu d/o Govindasamy be and is hereby fined a sum of RM2,000 until the defendant purges her contempt And it is further ordered that the aforesaid fine is to be paid within one (1) month from date hereof and in default thereof the defendant is to be committed to the Alor Setar Prison to be there imprisoned for a period of two (2) weeks ...

In his grounds of decision dated 3 August 1988 Lim J. stated that it was his considered opinion that in refusing to hand over the keys of the premises the defendant had clearly failed to comply with the terms of the order of the Court to deliver possession of the premises to the plaintiff, reinstate the plaintiff as a monthly tenant and to allow the plaintiff to have a quiet occupation of the premises.

As early as 21 June 1988 the plaintiff's solicitors wrote to the Court and requested for the hearing of the notice of motion (Enclosure 40) to be restored for further hearing on the ground that the defendant had not purged her contempt. By 21 June 1988 the defendant had sent to the plaintiff the key to her premises (it was sent on 13 April 1988) but she had not paid her fine as ordered; it was only on 22 April 1989 that she paid the fine of RM2,000.

Enclosure 40 was duly restored for further hearing. On 25 April 1989 a warrant for the committal of the defendant to prison was filed in the High Court by the plaintiff in the following terms -

Whereas by an order of this Court pronounced on 2 April 1988 it was ordered that the abovenamed G. Marimuthu do pay a fine of RM2,000 for her contempt of Court in disobeying the order of Court dated 3 July 1985 until she purges her contempt in default whereof within (1) month the said G. Marimuthu was ordered to be committed to the Alor Setar Prison to be there imprisoned for a period of (2) two weeks.

These are therefore to command you the Sheriff and every Police Officer to apprehend the said G. Marimuthu and her safely convey to the Alor Setar Prison there to be detained and kept in safe custody for (2) two weeks and thereafter until she purges her contempt or until further order of this Honourable Court.

In the meantime A.R. Jayaram passed away and on 19 August 1989 A.J. Lakshminarayanan was substituted as the plaintiff.

At the hearing of the said notice of motion Counsel for the plaintiff submitted that the defendant should be committed to prison on the warrant that had been filed as she had not paid the fine of RM2,000 within the time frame ordered by Lim J. Counsel for the plaintiff relied on *Corcoran v. Corcoran* [1950] 1 All ER 495 to say that the only ground on which the defendant could be freed was that she had complied with the order of Lim J. to pay the fine within the time frame given her. With respect I do not agree that that is what the case says. What it says is that the Court is not justified in discharging a person who continues to disobey its order. True the defendant did not pay the fine in time but, more importantly, consideration has to be given to the fact that the fine has been paid. In *Corcoran v. Corcoran* there was no attempt on the part of the contemnor to purge his contempt. Counsel also argued that the order of Lim J. had to be obeyed until it was discharged citing *Hadkinson v. Hadkinson* [1952] 2 All ER 567 as authority. I will be adverting to this case later but suffice it to say for the moment that the case establishes that a person who has committed a civil contempt may be subject to the rule that the Court will not hear an appeal or other application in the proceedings by a person disobeying an order of the Court until he has purged his contempt. Counsel also argued that it was for the defendant who was cited for contempt to initiate action to discharge or set aside the order for committal and requested that the defendant be directed to make the necessary application to discharge the order of suspended sentence made by Lim J. but I can hear the defendant on the basis of *Hadkinson v. Hadkinson* and I will come to it later.

Counsel for the defendant argued that the defendant had purged her contempt when she sent the key of the premises to the plaintiff and that the matter of the fine ordered by Lim J. to be paid within a certain time frame was a separate issue for contempt proceedings and that the plaintiff had to start fresh proceedings for contempt in regard to the matter of the fine. I do not agree as the payment

of the fine within a certain time frame is an integral part of the order of Lim J. and the Court has to consider whether the warrant should be executed for the failure to pay the fine within the time frame stipulated in the said order.

Before I go further I think the committal order has to be looked into. There are three aspects in the committal order in relation to the fine imposed by Lim J. on 2 April 1988 -

1. that the defendant was fined RM2,000;
2. that she was so fined "until the defendant purges her contempt";
3. that the fine had to be paid within one month from the date of order in default whereof the defendant was to be committed to prison for 2 weeks.

The reference to the defendant purging her contempt in paragraph 2 above must mean, in the context of her failure to deliver possession of the premises, that she had to surrender possession of her premises to the plaintiff and according to Lim J. (in his grounds of decision adverted to earlier) it meant she had to hand over the keys of the premises to the plaintiff. This, it is not disputed, she has done.

As regards the other 2 aspects of the order it seems to me that the terms in the order made by Lim J. that the defendant is "to be committed to the Alor Setar prison to be there imprisoned for 2 weeks" in default of payment of the fine within 1 month of the date of order, must be understood to mean that the order committing the defendant to 2 weeks imprisonment is suspended on condition that the defendant pays the fine of RM2,000 within two weeks from the date of the said order.

It is now not unusual for the Court to fine contemnors (see *Phonographic Performance Ltd. v. Amusement Caterers (Peckman), Ltd.* [1963] 3 All ER 493 which says the Court has, in the case of a civil contempt, power to impose the lesser penalty of a fine) but it is unusual to impose a term of imprisonment in default of the payment of the fine. In any event the imprisonment in default of fine is not punishment under the provisions of the Criminal Procedure. In my view it was a suspended committal order that was probably made under O. 53 r. 6(1) bearing in mind that Counsel for the defendant in mitigation before Lim J. (this was pointed out by Counsel for the plaintiff) pleaded for the committal order to be suspended (see p. 6 of notes of proceedings) and bearing in mind also that there was another condition that the defendant "purges her contempt" (meaning that she had to surrender the key to her premises to the plaintiff) which had to be satisfied. If these two conditions had not been included in the order of Lim J. there would have been a straight term of 2 weeks imprisonment for contempt and she would have been sent to prison on the day the order was made.

Under O. 53 r. 6(1) the Court by whom an order of committal is made may by order direct that the execution of the order of committal shall be suspended for such period or on such terms or conditions as it may specify. And under paragraph 2 of r. 6, where "execution of an order of committal is suspended by an order under paragraph (1) the applicant for the order of committal must, unless the Court otherwise directs, serve on the person against whom it was made a notice informing him of the making and terms of the order under that paragraph". I have gone through the notes of proceedings made by Lim J. and nowhere in the context of paragraph (2), is there a direction otherwise as regards service of the notice on the defendant. The Court records show that the order made by Lim J. was extracted only on 15 September 1989 but it must be pointed out that I am satisfied that the plaintiff's solicitor did forward the draft order to the Court on 13 July 1988. Whatever it is, it is quite clear that the terms of the order were not settled before the expiry of the 1 month period given to the defendant to settle the fine and that she had not been served with the notice required to be served on her under O. 53 r. 6(2). And I would be inclined to go no further on the warrant.

Assuming that the non-service of the notice on the defendant is a mere irregularity and therefore curable, the facts show that the defendant has complied with the greater part of the committal order. She has paid her fine of RM2,000. More importantly she has handed the key to the premises to the plaintiff. The *gravamen* of the contempt proceedings was that she neglected to deliver possession to the plaintiff and Lim J. had held, as stated earlier, that in refusing to hand over the keys of the premises the defendant had clearly failed to comply with the terms of the order to deliver possession of the premises to the plaintiff. In paying the fine and delivering the

key the defendant has complied with the order of Lim J. save that she did not pay the fine on time. Should she go to prison for paying the fine late? It is pertinent to bear in mind what Denning MR said in *Re W. (B) (an infant)* [1969] 1 All ER 594,

> The case raises a difficult point of law. When it was first heard, it was by two judges who were divided on it. Now it comes before this Court of three. We are all of opinion that Megarry J. had a discretion on the matter. The sentence of six months did not come into operation at once and automatically on a breach being proved. The Court has a discretion analogous to a suspended sentence in the criminal Courts. Imprisonment is not the inevitable consequence of a breach. The Court has a discretion to do what is just in all the circumstances. It can reduce the length of the sentence or can impose a fine instead. It may indeed not punish at all. It all depends on how serious is the breach, how long the man has behaved himself, and so forth.

Viewing all the circumstances of the case, I do not think I would be justified in allowing the warrant of committal to be executed against the defendant merely to rigidly enforce a stipulation in the order that she had to pay by a certain date, a date which has come and gone. In my view she should not go to prison.

So far I have gone on the basis that the order of committal was made probably under O. 53 r. 6. Even if it was not a suspended committal order I think I would be justified to intervene and hear what the defendant has to say although *prima facie* she should not be heard because she disobeyed the order of Lim J. But Denning LJ in *Hadkinson v. Hadkinson*, referred to earlier, was of the view the Court has a discretion in the following terms at p. 575,

> ... I am of opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

Counsel for the defendant argued that the defendant has complied with the order of Lim J. I think what he is saying is that at the moment there is no more disobedience; it is not a continuing disobedience, as, the date by which the fine had to be paid has come and gone and the fine has indeed been paid and the key indeed surrendered. In other words the order of Lim J. has substantially been complied with and as I have said earlier I would not be justified in allowing the warrant of committal to be executed against the defendant merely to rigidly enforce a stipulation in an order as a date by which a fine has to be paid when the date has come and gone but otherwise the contempt has been purged. In the premises I rule that the warrant need not be executed.